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Collateral Estoppel As the Answer to Multiple Litigation Problems in Federal Tax Law: Another View of *Sunnen* and *The Evergreens*

Charles A. Heckman

Collateral estoppel has always been something of an enigma. Conceptually, it has often been ill defined and difficult to apply. The author analyzes the use of this doctrine in federal tax litigation where annual tax returns often lead to multiple litigation between the Government and the taxpayer on similar facts and issues over a number of years. The author places particular emphasis on two cases, The Evergreens *and* Sunnen, *which were thought to clarify this turbulent area. Professor Heckman concludes that the substance of the* Sunnen *doctrine did not originate in tax law, and that recent cases merely demonstrate the continued confusion of the courts in applying and interpreting collateral estoppel as defined in* The Evergreens *and* Sunnen.

FOR A DOCTRINE supposed to be productive of peace, collateral estoppel has had a singularly stormy career in federal tax litigation. Briefly stated, collateral estoppel bars parties who have litigated an issue from relitigating that issue in other causes of action between themselves.[1] According to traditional authority, the doctrine may apply to factual issues or to issues of mixed law and fact, but never to issues of pure law or to matters strictly evidentiary in nature in the first litigation.[2] This doctrine is a branch of the doctrine of res judicata, by which name it is sometimes erroneously called. Res judicata bars relitigation by the same parties of a cause of action which has been finally determined by a court of competent jurisdiction.

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Collateral estoppel is frequently asserted in federal tax litigation extending over several taxable periods because each taxable period

[1] *See* Cromwell v. County of Sac, 94 U.S. 351, 352 (1876); F. JAMES, JR., CIVIL PROCEDURE § 11.18, at 575 (1965).

[2] *See* Cromwell v. County of Sac, 94 U.S. 351, 353 (1876); F. JAMES, JR., *supra* note 1, § 11.18, at 576 (1965).

gives rise to a separate cause of action. A situation giving rise to a tax dispute, such as the interpretation of a contract or trust instrument to determine who has the right to income from the property subject to the contract or trust instrument, frequently affects taxes in many subsequent tax years and therefore in many possible causes of action. Even when the tax consequences of such a situation have once been passed upon by a competent court, it is human nature for the loser to seek out a better deal by trying to relitigate the point in subsequent years. Collateral estoppel also raises problems when there are civil and criminal cases involving the same taxpayer, but this article will not deal with those issues.

It was originally in doubt whether collateral estoppel had any application to federal tax cases at all, and even after the United States Supreme Court had decreed that the doctrine did apply to tax law, there was a strong tendency to limit its application. Two cases, *Commissioner v. Sunnen*[3] and *The Evergreens v. Nunan*,[4] typify this view and are of paramount importance in tax law. They have also had great influence in other areas of the law. *Sunnen* held (1) that collateral estoppel does not apply in "separable even though similar" fact situations and (2) that collateral estoppel does not apply where there has been a change of law between the first and second decisions.[5] *The Evergreens* held that estoppel does not run on facts that form a part of the chain of logic leading to the determination of the ultimate facts in the second case.[6]

Courts and commentators seem to assume that these two cases provide for a narrow application of collateral estoppel which is unique to tax law and that such a narrow application is desirable.[7] The purpose of this article is to show, by a discussion of the history and interpretation of the major cases governing the application of collateral estoppel in tax law, that to some extent *The Evergreens* and *Sunnen* were misinterpreted and that subsequent cases have re-

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[3] 333 U.S. 591 (1948).

[4] 141 F.2d 927 (2d Cir. 1944).

[5] 333 U.S. at 600-01.

[6] 141 F.2d at 931.

[7] Parker v. Westover, 221 F.2d 603, 605 (9th Cir. 1955); Trapp v. United States, 177 F.2d 1, 4 (10th Cir. 1949); Commissioner v. Texas-Empire Pipe Line Co., 176 F.2d 523, 525 (10th Cir. 1949); Boston Safe Deposit & Trust Co. v. United States, 129 F. Supp. 616, 620 (D. Mass. 1955); Journal-Tribune Publishing Co., 38 T.C. 733, 744 (1962); Maud H. Bush, 10 T.C. 1110, 1113 (1948); Polasky, *Collateral Estoppel — Effects of Prior Litigation*, 39 IOWA L. REV. 217, 235 (1954); Raum, *The Sunnen Case and Res Judicata in Federal Tax Litigation*, N.Y.U. 7TH INST. ON FED. TAX. 253, 262 (1949).

vealed serious flaws in their doctrines which require remedial action. Finally, an attempt will be made to indicate the direction this remedial action should take.

I. APPLICATION OF COLLATERAL ESTOPPEL TO TAX LAW

When the Supreme Court first applied collateral estoppel to federal tax law, it apparently envisioned an application identical to that in other fields. In *Tait v. Western Maryland Railway Co.*,[8] the Court dealt with the proper amortization of discounts on the sale of bonds of the taxpayer. The deduction was first litigated for the years 1918-19, with the taxpayer succeeding. The Government then disallowed the deduction for the years 1920-25. The district court found for the taxpayer on the basis of collateral estoppel,[9] and the court of appeals affirmed.[10]

The principal basis of the Government's appeal was that collateral estoppel did not apply in tax cases because each year gave rise to a different cause of action, the determination of which could not affect rights in any other cause. The Supreme Court refuted this contention:

> [T]he scheme of the Revenue Acts is an imposition of tax for annual periods, and the exaction for one year is distinct from that for any other. But it does not follow that Congress in adopting this system meant to deprive the government and the taxpayer of relief from redundant litigation of the identical question of the statute's application to the taxpayer's status.[11]

The *Western Maryland* case appears to have assumed that collateral estoppel would operate in tax cases exactly as it had operated in other cases, and the Court made no attempt to distinguish the extent of its applicability. As a consequence of this fact, and perhaps because of abuses in lower courts,[12] the case was subject to criticism almost from the date of its publication.[13]

II. EFFECT OF INTERVENING CHANGE OF LAW

The first major erosion of the *Western Maryland* case was *Blair v. Commissioner*.[14] In *Blair* the income beneficiary of a trust had

[8] 289 U.S. 620 (1933).

[9] Western Md. Ry. v. Tait, 53 F.2d 211 (D. Md. 1931).

[10] Tait v. Western Md. Ry., 62 F.2d 993 (4th Cir. 1933).

[11] 289 U.S. at 624.

[12] *See* Griswold, *Res Judicata in Federal Tax Litigation*, 46 YALE L.J. 1320, 1355 (1936).

[13] *Id.*

[14] 300 U.S. 5 (1937).

assigned his interest in the trust to his children. For the year 1923, the Government contended that the income was still taxable to the original beneficiary on the theory that the trust was a spendthrift trust and that the assignment was invalid. This contention was denied by the Board of Tax Appeals,[15] but was upheld by the Seventh Circuit Court of Appeals.[16]

The years 1924, 1925, 1926, and 1929 were then litigated before the Board of Tax Appeals,[17] but in the interim, the will setting up the trust had been construed by the Illinois courts, and it was held that the trust was not a spendthrift trust.[18] The Board of Tax Appeals admitted evidence of the State decision, refused to apply collateral estoppel, and found for the taxpayer.[19] The court of appeals reversed,[20] but the Supreme Court reversed the court of appeals, finding for the taxpayer on the theory that the intervening change of State law made collateral estoppel inapplicable.[21]

The *Blair* case represented a considerable departure from the traditional doctrine that estoppel would be applicable in spite of a showing that the original holding was clearly erroneous.[22] Lower courts were quick to follow the *Blair* lead, and shortly decided that an intervening change in federal law avoided estoppel as easily as an intervening change in State law.[23]

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[15] Edward T. Blair, 18 B.T.A. 69 (1929).

[16] Commissioner v. Blair, 60 F.2d 340 (7th Cir. 1932), *cert. denied*, 288 U.S. 602 (1933).

[17] Edward T. Blair, 31 B.T.A. 1192 (1935).

[18] Blair v. Linn, 274 Ill. App. 23 (1934).

[19] Edward T. Blair, 31 B.T.A. 1192 (1935).

[20] Commissioner v. Blair, 83 F.2d 655 (7th Cir. 1936).

[21] Blair v. Commissioner, 300 U.S. 5, 9 (1937).

[22] United States v. Moser, 266 U.S. 236 (1924); 2 H. BLACK, JUDGMENTS § 514 (2d ed. 1902) [hereinafter cited as BLACK]; 2 A. FREEMAN, JUDGMENTS § 709 (5th ed. 1925) [hereinafter cited as FREEMAN]. It has even been suggested that the *Western Maryland* case continues this rule in force, thus resulting in the rather anomalous situation in which a decision clearly wrong at the time handed down creates an estoppel in the absence of intervening change of law, but a decision clearly right at the time handed down will not create an estoppel if change of law intervenes. Polasky, *supra* note 7, at 239-40. It seems unlikely that the *Blair* case intended any such result, but one case has so held. Brailas v. United States, 79 F. Supp. 963, 965 (S.D.N.Y. 1948) (reasoning on the basis of Commissioner v. Sunnen, 333 U.S. 591 (1948)).

[23] Corrigan v. Commissioner, 155 F.2d 164 (6th Cir. 1946); Commissioner v. Arundel-Brooks Concrete Corp., 152 F.2d 225 (4th Cir. 1945); Pelham Hall Co. v. Hassett, 147 F.2d 63 (1st Cir. 1945); Monteith Bros. Co. v. United States, 142 F.2d 139 (7th Cir. 1944); Hendricksen v. Seward, 135 F.2d 986 (9th Cir. 1943).

III. THE EVERGREENS DOCTRINE

The impetus for narrowing the application of collateral estoppel was next reflected in the case of *The Evergreens v. Nunan.*[24] The facts of *The Evergreens* case were as follows: On March 1, 1913, The Evergreens, a cemetery development company, owned a quantity of land, some of which had been fully improved as cemetery lots, while others were only partially improved. In the first case, the Board of Tax Appeals found the March 1, 1913 value of the improved lots, sold between 1929-33, to be $1.55 per square foot.[25] The issues in the second case[26] involved the March 1, 1913 value of some of the improved lots sold in 1934 and 1935 and of some of the partially improved land sold to the City of New York for park purposes in 1934. The taxpayer contended that the earlier case had created an estoppel as to the value of all the improved lots at $1.55 per square foot, and therefore the March 1, 1913 value of all the partially improved lots was the same less the cost of improvement at that time. The taxpayer prevailed before the Board of Tax Appeals as to the value of the improved lots on the basis of collateral estoppel, but the Board refused to apply the doctrine to the value of the unimproved lots.[27]

The Evergreens thus presented the following problem: Assuming a fact were of sufficient significance in the first suit to create an estoppel, would the estoppel still hold if the fact were one from which the court reasoned its way to a conclusion in the second suit? In this situation exactly the same facts were involved in both cases and no intervening change of law occurred, thus eliminating the *Blair* problems.

A. Policy Considerations

The Evergreens case is closely related to, and to some extent deals with, a traditional problem growing out of a basic conflict in policy considerations. Collateral estoppel should apply to as many issues as possible to eliminate repetitive litigation. On the other hand, the doctrine should be applied narrowly enough to ensure each party a fair hearing on all issues. These policy considerations resulted in the development of the principle that collateral estoppel

[24] 141 F.2d 927 (2d Cir. 1944).

[25] Evergreens Cemetery Ass'n v. Commissioner, 111 F.2d 863, 865 (7th Cir. 1940).

[26] The Evergreens, 47 B.T.A. 815 (1942).

[27] *Id.* at 825. *See also* United States v. Kramer, 289 F.2d 909, 916 (2d Cir. 1961) (Friendly, J.).

only applies to the issues essential to the judgment in the first case.[28] Thus, since each issue on which estoppel runs was important to the first litigation, we can be sure that the litigants have really put forth their best efforts on the estopped issues and have had a fair hearing. A corollary of this doctrine is that estoppel will never run on evidentiary facts in the first litigation,[29] partly because no single piece of evidence may be important enough to warrant a litigant's full truth-determining efforts, and partly because it is frequently impossible to tell how a court decided on a particular piece of evidence. The statement that estoppel runs only on facts essential to the judgment is deceptively simple, however, since in reality defining which facts are "essential" to the judgment has proved enormously difficult.[30] The standard judicial effort at clarifying this matter usually consists of merely calling it by another name, thus multiplying definitions and adding to the confusion.[31]

B. *"Ultimate Facts" and "Mediate Data"*

Judge Hand's decision in *The Evergreens* has gained notoriety on two grounds: his definition of issues in the first case which could be the basis of estoppel (although that was not directly involved in *The Evergreens*), and his definition of those issues upon which estoppel could operate in subsequent litigation. To serve both purposes, Judge Hand introduced yet another set of definitions into a field already overcrowded with them:

> [A] "fact" may be of two kinds. It may be one of those facts, upon whose combined occurrence the law raises the duty, or the right, in question; or it may be a fact from whose existence may be rationally inferred the existence of one of the facts upon whose

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28 City of New Orleans v. Citizens Bank, 167 U.S. 371, 396-97 (1897); Cromwell v. County of Sac, 94 U.S. 351, 353 (1877); Smith v. Town of Ontario, 4 F. 386, 390 (C.C.N.D.N.Y. 1880); 2 BLACK §§ 504, 609 (and cases cited therein); 2 FREEMAN §§ 688-89; RESTATEMENT OF JUDGMENTS § 68 (Supp. 1965).

29 2 FREEMAN § 690.

30 *Compare* King v. Chase, 15 N.H. 9, 16 (1844), limiting estoppel to the "matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings . . . ." *with* Alexander v. Worthington, 5 Md. 471, 488-89 (1854): "[O]n the principle of estoppel it is conceded, that a judgment is conclusive on any point fairly in issue, and on which the judgment might have been rendered . . . . All that is required . . . to establish the authority of any decision is that the 'very point' decided was 'actually before' the mind of the court, and was investigated with care and considered in its fullest extent." *See generally* 2 BLACK § 614: "[T]he authorities are in conflict upon this subject, and the matter rests in much doubt and confusion."

31 A discussion of the problem presented by the proliferation of phrases defining the same concept is found in Note, *Collateral Estoppel by Judgment*, 52 COLUM. L. REV. 647, 661-62 (1952).

> combined occurrence the law raises the duty, or the right. The first kind of fact we shall for convenience call an "ultimate" fact; the second, a "mediate datum."[32]

Having stated his definitions, Judge Hand indicated that the better rule was that only "ultimate facts" in the first case created estoppel. He then held that collateral estoppel did not apply to the situation before him where the taxpayer was seeking estoppel on "mediate data" in the second litigation. According to Judge Hand, the taxpayer was seeking to reason from an estopped fact to a conclusion in the subsequent litigation, and he objected to this because the privilege of drawing all possible conclusions from the estoppel greatly increased the risks of the first litigation. He stated his ideal doctrine in the following terms:

> What jural relevance facts may acquire in the future it is often impossible even remotely to anticipate. Were the law to be recast, it would therefore be a pertinent inquiry whether the conclusiveness, even as to facts "ultimate" in the second suit, of facts decided in the first, might not properly be limited to future controversies which could be thought reasonably in prospect when the first suit was tried.[33]

Judge Hand then went on to state his method of eradicating this evil under existing law:

> [W]e do not hesitate to hold that, even assuming arguendo that "mediate data," decided in the first suit, conclusively establish facts, "ultimate" in the second, no fact decided in the first whether "ultimate" or a "mediate datum," conclusively establishes any "mediate datum" in the second, or anything except a fact "ultimate" in that suit.[34]

(1) "Mediate Data" and "Evidentiary Facts." —Although lauded by the commentators, even to the extent of having its definition of "ultimate facts," although not the term itself, incorporated in the 1948 supplement of the *Restatement of Judgments*,[35] *The Evergreens* can be regarded in retrospect only as a mistake. A field already overcrowded with obscure terms had no need of still another: "mediate data." Even those authorities most impressed with the Hand analysis soon equated the term with the traditional "evidentiary facts"[36] to which estoppel had never been applied.[37]

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[32] 141 F.2d at 928.

[33] *Id.* at 929.

[34] *Id.* at 930-31.

[35] RESTATEMENT OF JUDGMENTS § 337 (Supp. 1949).

[36] *Id.* § 336; *see* Yates v. United States, 354 U.S. 298, 338 (1957).

[37] 2 FREEMAN § 690.

(2) Confusion with "Ultimate Facts." —Not much more can be said for the term "ultimate facts." It is true that at least Judge Hand did not invent it — it has had a long history in the law of collateral estopel.[38] Unfortunately, that history is just as lacking in precise thought as is the history of all other terms attempting to define the same concept. Furthermore, the term has been used in juxtaposition with "evidentiary facts" in many codified rules of pleading such as old Federal Equity Rule 25, which read:

> Hereafter it shall be sufficient that a bill in equity shall contain, in addition to the usual caption:
>
> . . . .
>
> . . . Third, a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence.[39]

At the time of *The Evergreens*, the term "ultimate facts" as used in pleadings had been extensively debated for years.[40] It would therefore have been preferable for Judge Hand to have indicated whether his "ultimate facts" were the same as those used for pleadings. It is unlikely that they were, since even the most restrictive view of the doctrine[41] allows estoppel to reach beyond the pleadings.[42] If they were not being used as equivalents, one might well question the wisdom of using the same term to mean different things in different branches of the law. The major premise of *The Evergreens*, that no estoppel operates on "mediate data" in subsequent litigation, was also commended by the commentators; however, to the extent that "mediate data" encompassed anything more than the traditional "evidentiary facts," the doctrine has never gained wide acceptance.[43]

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38 *See, e.g.*, Smith v. Town of Ontario, 4 F. 386, 390 (C.C.N.D.N.Y. 1880).

39 Compare the old rule with FED. R. CIV. P. 8(a).

40 *See* Mumm v. Jacob E. Decker & Sons, 301 U.S. 168 (1937); Hickey v. Ritz-Carlton Restaurant & Hotel Co., 96 F.2d 748 (3d Cir. 1938); Commissioner v. Sharp, 91 F.2d 804 (3d Cir. 1937); Ocean Acc. & Guar. Corp. v. J.L. Brandeis & Sons, 75 F.2d 605 (8th Cir.), *cert. denied*, 295 U.S. 764 (1935).

41 *E.g.*, King v. Chase, 15 N.H. 9 (1844).

42 *Id.* at 16. "The declaration and pleadings may show specifically what [the matter in issue] is, or they may not. If they do not, the party may adduce other evidence to show what was in issue, and thereby make the pleadings as if they were special."

43 "Conjecture as to desirable refinements aside, the requirement that the fact be ultimate in the second case seems not to have been universally adopted, even in the second circuit." Polasky, *supra* note 7, at 239. "Although no court has expressly rejected it, the second circuit now is alone in applying the new rule." Note, *supra* note 31, at 663. In Yates v. United States, 354 U.S. 298, 338 (1957), the Supreme Court spoke approvingly of this aspect of *The Evergreens*, but only to the extent that "mediate data" meant evidentiary facts.

C. *Foreseeability*

Judge Hand's introduction of the obscure contrast between "mediate data" and "ultimate facts" was an attempt to introduce foreseeable consequences as a criterion of collateral estoppel. As Professor Polasky has said:

> Discerning the touchstone of foreseeability to be of assistance in the determination of the optimum limits of preclusion, *The Evergreens* case further enunciates the proposition that facts determined in the prior action are conclusive only as to the "ultimate" facts at issue in the second action.[44]

The problem with this attempt is that the place of an issue in the logical structure of a lawsuit has no bearing on the foreseeability of its use in subsequent litigation; nor does the place of the issue in the logical structure of the subsequent litigation bear upon the foreseeability of its use at the time of the first litigation. Judge Hand's goal may have been worthy, but his means of attaining it were inadequate.

The Evergreens was thus a relatively unfortunate attempt to join the trend which was tending to limit the application of collateral estoppel. Full bloom was reached in the subsequent flurry of comments stirred up by the case of *Commissioner v. Sunnen.*[45]

IV. THE SUNNEN DOCTRINE

The taxpayer in *Sunnen* was an inventor who had licensed a corporation controlled by him to manufacture various devices under a series of contracts beginning in 1928. The taxpayer then assigned to his wife all right, title, and interest in the virtually identical license contracts.

In a previous case, the Board of Tax Appeals had dealt with the taxpayer's income tax liability for the years 1929-31 under a contract made in 1928.[46] In that case, the Commissioner had contended that the income of the assigned contract was taxable to the taxpayer, but the Board of Tax Appeals found instead for the taxpayer. In the second case, involving the years 1937 through 1941, income from the 1928 contract was again in question as well as income from virtually identical contracts which had not been in question in the first litigation. The taxpayer asserted that collateral

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[44] Polasky, *supra* note 7, at 238.

[45] 333 U.S. 591 (1948).

[46] Joseph Sunnen, 1935 P-H TAX CT. MEM. ¶ 35,211.

estoppel barred attempts to tax the income from any of the licensing contracts to him. The Tax Court held that collateral estoppel applied to the 1928 contract, so that its income could not be taxed to the taxpayer, but that the doctrine did not apply to the other contracts.[47] As to these, the Tax Court held that intervening decisions had changed the law since the first case, and that the income was taxable to the taxpayer.

The Court of Appeals for the Eighth Circuit affirmed as to the 1928 contract, but reversed on other grounds without reaching the issue of collateral estoppel on the other contracts.[48] On certiorari the Supreme Court reversed the Eighth Circuit entirely, thus awarding the Commissioner complete victory.[49] The Supreme Court held: (1) that the later contracts had not been before the Board in the previous case and, therefore, no estoppel existed; and (2) that in respect to the original 1928 contract, although the same subject matter had already been adjudicated, intervening changes in the law made collateral estoppel inapplicable.

A. Separable Though Similar Facts

On the first point, the Court stated: "[I]f the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case."[50] The principal difficulty with this statement is that it made a basically simple subject unduly complicated. With regard to the contracts made subsequent to the years previously litigated, the response to any proponent of collateral estoppel is simply that those contracts had not previously been the subject of litigation, so no estoppel could exist. This reasoning is a much simpler means of arriving at the result than the statement of the Court, even though the Court was really saying the same thing. The Court's statement actually encompasses two concepts well established in traditional doctrine: (1) that collateral estoppel does not govern purely legal issues which recur in the second case[51] and (2) that no matter how

[47] Joseph Sunnen, 6 T.C. 431 (1946).

[48] 161 F.2d 171 (8th Cir. 1947).

[49] Commissioner v. Sunnen, 333 U.S. 591 (1948).

[50] *Id.* at 601.

[51] Spencer v. Watkins, 169 F. 379 (8th Cir. 1909); Mercantile Nat'l Bank v. Lander, 109 F. 21 (N.D. Ohio 1901); People v. Cassiday, 50 Colo. 503, 117 P. 357 (1911); American Car & Foundry Co. v. James, 139 Ky. 167, 129 S.W. 564 (1910); Yazoo & Miss. Val. R.R. v. Adams, 81 Miss. 90, 32 So. 937 (1902); State *ex rel.* Kennedy v. Broatch, 68 Neb. 687, 94 N.W. 1016 (1903); State *ex rel.* Wright v. Savage, 64 Neb. 684, 90 N.W. 898, *modified on rehearing*, 64 Neb. 702, 91 N.W. 557 (1902); Okla-

much a factual issue may resemble one previously litigated, no estoppel exists if that particular issue itself has not been litigated.[52] The "separable even though similar" language has lent itself to misinterpretation because it has tended to focus attention on searching out similarity or separability of issues rather than on analysis according to the two clear and well-established doctrines which the statement includes.

B. *Intervening Change of Law*

On the second point, with reference to intervening change of law, the Court held:

> [A] judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable. . . . [T]he supervening decision cannot justly be ignored by blind reliance upon the rule of collateral estoppel. . . . It naturally follows that an interposed alteration in the pertinent statutory provisions or Treasury regulations can make the use of that rule unwarranted.[53]

This holding is not an innovation, since it is merely an affirmation of the *Blair* case and its progeny in the lower courts.[54]

In addition to taxation cases, the *Sunnen* Court relied on *State Farm Mutual Automobile Insurance Co. v. Duel*[55] and Freeman's treatise on judgments[56] to support its second point. Freeman addresses himself only to the point concerning change in the law by statute, and even there contends that intervening change does not affect collateral estoppel unless it is the clear intent of the statute to do so. Freeman, therefore, only presages the *Sunnen* proposition to the extent that statute and judgemade law are equivalent.

The *State Farm* case, however, is directly on point. The basic issue there was the constitutionality of certain State regulations of an insurance company. Because the State license was issued annu-

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homa R.R. v. Severns Paving Co., 67 Okla. 206, 170 P. 216 (1917); 2 FREEMAN § 709, at 1496; RESTATEMENT OF JUDGMENTS § 70 (1942).

[52] The first judgment is conclusive only "as to the point or question actually litigated." Cromwell v. County of Sac, 94 U.S. 351, 353 (1876). This language is also cited in Southern Pac. R.R. v. United States, 168 U.S. 1, 50 (1897).

[53] Commissioner v. Sunnen, 333 U.S. 591, 600-01 (1948) (footnotes omitted).

[54] The *Sunnen* opinion actually indicates that in the *Blair* situation an intervening change of State law is a change in the factual situation for the federal court. 333 U.S. at 600. Whatever the theoretical difference between intervening State and federal decrees, it seems clear from a reading of the cases in note 23 *supra*, that the *Blair* case was the original basis of the federal change of law doctrine.

[55] 324 U.S. 154 (1945).

[56] 2 FREEMAN § 713.

ally, the issue of collateral estoppel arose, and the Court held: "[I]t is . . . the general rule that *res judicata* is no defense where between the time of the first judgment and the second there has been an intervening decision or a change in the law creating an altered situation."[57]

Another pre-*Sunnen* authority, the *Restatement of Judgments*,[58] provides that collateral estoppel as to legal issues is inapplicable where injustice would result. While this statement potentially embraces much more than an intervening change of law, it is clear that one of the examples in Comment *f* is taken from the *Blair* case and is aimed at the intervening change situation.[59]

In light of this discussion, it can be seen that the function of *Sunnen* on the point of intervening change of law was really to sanction the view already held by the balance of tax authority and influential authority in general law as well.[60]

The publication of the *Sunnen* opinion was greeted with considerable commotion and approval by commentators in the tax field, for they seem to have supposed that it prescribed a new and narrow application of collateral estoppel peculiar to tax cases. But the above discussion indicates that the *Sunnen* case was not nearly so

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[57] 324 U.S. at 162. In the *State Farm* case the appellant was challenging the validity of a Wisconsin statute requiring every insurance company operating in the State to set up substantial reserves against possible claims. In litigating the first year for which its license had been denied, appellant had not raised the issue of violation of the commerce clause, since at that time the status of insurance business as interstate commerce had not been established. While the case was pending in the Supreme Court, the case of United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), was decided, in which it was determined that insurance was interstate commerce. While the appellant lost on all other grounds, the Court held that it had a right to a hearing on the commerce clause point, and the question thus became how to obtain a hearing before the Wisconsin courts on the matter. The Court held that the judgment would not be vacated, since the point was being litigated for a succeeding year, and that the appellant would not be barred in the succeeding year's litigation by collateral estoppel because of the intervening change of law.

[58] RESTATEMENT OF JUDGMENTS § 70 (1942).

[59] Further support for the contention that the *Sunnen* position was established prior to 1948 may be found in an article by Professor Scott, reporter for the RESTATEMENT OF JUDGMENTS. Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 10 (1942). *See* United States v. Stone & Downer Co., 274 U.S. 225, 236 (1927).

[60] The last case in tax law adopting a position contrary to the doctrine that was to be *Sunnen* appears to have been Commissioner v. Western Union Tel. Co., 141 F.2d 774 (2d Cir. 1944). The court there specifically held that intervening change of federal law did not avoid collateral estoppel, and distinguished the *Blair* case on the ground that an intervening change of State law was a change in the factual situation in a federal case, not a change of legal principles. The only authority cited for this result, however, was the *Western Maryland* case, which did not purport to stand for that proposition, but instead held specifically that there had been no intervening change of law. Tait v. Western Md. Ry., 289 U.S. 620, 625 (1933). The *Western Union* case thus rested on inadequate authority.

remarkable as claimed. The principles it set forth appear to have been drawn from existing authority and apply equally well to other fields besides taxation. There was also great expectation that *Sunnen* would provide a clear and final answer to collateral estoppel problems in tax cases.[61]

In the years since the *Sunnen* decision, only the intervening change doctrine of *Sunnen* has really worn well. The "separable even though similar" language of *Sunnen* and the doctrine of *The Evergreens* have not served their purposes at all.

V. THE AFTERMATH OF SUNNEN

The unnecessary focus on similarity or separability of issues in the *Sunnen* case has led to applications of collateral estoppel which have been either too broad or too narrow, depending upon the mood of the court.

A. Separable Facts

(1) The Narrow Application. —The narrow extreme is exemplified by the *C. D. Johnson Lumber Corp.*[62] case. In the first litigation,[63] dealing with the year 1936, the Board of Tax Appeals sought to determine the basis of certain assets held by the taxpayer. The taxpayer claimed to have received the assets in a tax-free reorganization, thus entitling the taxpayer to the basis of its transferor. The Commissioner denied that the taxpayer had received the assets in a tax-free reorganization, and computed the market value of the assets at the time of their acquisition on the basis of various bids made for them by others to the transferor. The Commissioner's computation was upheld.

The second case[64] involved the basis of the same assets for a later year. There, the taxpayer sought to introduce evidence of the actual cost to it of the assets in question in an effort to establish a higher basis than had been allowed in the first case. The Commissioner claimed the taxpayer was collaterally estopped on that issue.

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[61] Raum, *The Sunnen Case and Res Judicata in Federal Tax Litigation*, N.Y.U. 7TH INST. ON FED. TAX 253, 262 (1949); Sellin, *The Sunnen Case — A Logical Terminus to the "Issue" of Res Judicata in Tax Cases*, 4 TAX L. REV. 313, 363 (1949).

[62] 47 B.T.A. 873 (1942).

[63] *Id.*

[64] C.D. Johnson Lumber Corp., 12 T.C. 348 (1949).

The Tax Court found that no estoppel existed since the actual cost had not been litigated in the first case.[65]

It is difficult to justify the result reached in the *Johnson Lumber* case, since it is clear that the basis of these assets had been put in issue and determined in the first litigation, and since actual cost is merely an element in the determination of basis. There was no separability of issues here. The only factor allowing the taxpayer to avoid the estoppel was the fact that it presented an incomplete case in the first litigation — there was no evidence on actual cost the first time. There was no reason why this could not have been done, and it would seem a wise litigant would have done so as a hedge against losing on the tax-free reorganization issue. As it was, the taxpayer was allowed to waste everyone's time by bringing two actions instead of one to develop his case.[66] The estoppel was defeated by focusing on a spurious "separable" element, thus using the *Sunnen* doctrine in a rather cynical manner.

(2) The Broad Application. —The Court of Claims provides most of the examples of using the *Sunnen* language to achieve too broad an application of collateral estoppel. In the *Hercules Powder Co. v. United States* cases[67] the taxpayer had purchased some of its own shares in the years 1930-32 and had held them until the years 1952-53, when it distributed them to its employees as a part of its annual bonus program. For the year 1952, the Commissioner contended that the company had dealt in its own shares as it would deal in the shares of another company and assessed a capital gains tax for 1952 on the difference between the market value of the shares at the time of distribution and the price at which they were purchased. In the first case[68] the taxpayer prevailed. The Government, however, persisted, and the year 1953 was then litigated. The Government's defense against the taxpayer's claim of collateral estoppel relied *inter alia* upon the fact that the bonuses were not paid pursu-

[65] *Id.* at 360. The Tax Court relied on the *Sunnen* doctrine as a basis for its decision.

[66] The opponent of collateral estoppel sometimes cites his own error in the first litigation as the reason why he should not be estopped. The error is usually failure to present all the evidence available or erroneous stipulation of a fact. Tait v. Western Md. Ry., 289 U.S. 620, 625-26 (1933); Stern & Stern Textiles, Inc. v. Commissioner, 263 F.2d 538 (2d Cir. 1959); Slifka v. Johnson, 146 F. Supp. 249 (S.D.N.Y. 1956) (*semble*). While one may feel sorry for the litigant whose counsel has failed him in this fashion, it still seems that the burden of adequate and complete presentation of a case the first time around should be on the litigant, and that his argument should not prevail in the absence of fraud by the opposing party.

[67] 337 F.2d 643 (Ct. Cl. 1964) and 180 F. Supp. 363 (Ct. Cl. 1960).

[68] 180 F. Supp. at 367.

ant to any preestablished policy, but were voted on an annual basis by separate and varying resolutions of the board of directors.[69] The majority of the Court of Claims thought that collateral estoppel applied. They strained the *Sunnen* language by interpreting it to mean that even when facts in the second litigation had not been previously litigated, collateral estoppel would apply unless there was a significant difference between the facts of the two cases. The emphasis was thus entirely on similarity, with separability omitted completely. A strong dissent,[70] however, could see no difference between the sequential resolutions of the board of directors and the separable although similar contracts of the *Sunnen* case. The dissent seems correct, for the subsequent resolution was not passed on in the first case, and the resolutions could and did vary in their terms. Each one should therefore have been scrutinized by the courts.

In *Southern Maryland Agricultural Association v. United States*,[71] the Court of Claims again applied collateral estoppel very broadly. The taxpayer was the proprietor of a horseracing track. Maryland law required it to pay over a small percentage of the money wagered at the track to the racing commission each year as a tax.[72] The funds so paid over were kept in separate accounts for 3 years, during which time the racetrack owner could draw on them to make capital improvements. Any funds not so refunded within 3 years became a part of the regular State revenue.

The taxpayer had duly paid these taxes to the racing commission and had deducted them from its federal income tax return. From 1947-50, it had then received refunds for capital improvements. The Commissioner determined that the refunds were income in the years of refund, but the taxpayer contended that they were contributions to its capital by the State. For the years 1947-49 the Government succeeded in the district court,[73] and the decision was affirmed by the Fourth Circuit.[74] In the second case, for the

[69] 337 F.2d at 644.

[70] *Id.* at 647 (dissenting opinion).

[71] 147 F. Supp. 276 (Ct. Cl. 1957).

[72] MD. ANN. CODE art. 78b, § 12 (1957):

> For the calendar year 1947 and for each year thereafter, each licensee licensed under the provisions of § 7 of this article shall deduct one-half of one per-centum from the total amount of money wagered on all races during each and every meeting and shall pay to the Maryland Racing Commission, for the use of the State of Maryland, such sums so deducted as a tax . . . .

[73] 126 F. Supp. 125 (D. Md. 1954).

[74] 227 F.2d 200 (4th Cir. 1955).

year 1950, before the Court of Claims,[75] the Government claimed the taxpayer was collaterally estopped and succeeded, the court holding that these were the same facts as in the first case.

This application of collateral estoppel, if not as blatant a flaunting of *Sunnen* as the *Hercules Powder* case, also stretches the "separable even though similar" doctrine somewhat. It is only by considering the general application of the State statute to the general status of the taxpayer as a single fact common to both cases that would bring this case within the *Sunnen* rule without further analysis. With revenue laws, however, the application of the statute to the taxpayer's status is nearly always considered a distinct issue for each taxable period. Furthermore, the Maryland statute governing the second case, although similar to its predecessor, first became effective in 1947. The first case could thus have involved refunds of State taxes levied entirely prior to 1947 and would therefore have involved different taxable periods and a different statute. All of these facts have a bearing on the case, and a general reference to *Sunnen* without discussing them is not a sufficient basis for the result.

(3) The Misapplication. —Two cases[76] involving the Consolidated Edison Company of New York provide an interesting contrast to the *Southern Maryland* case. Consolidated Edison had for many years been contesting its real property tax liability with the City of New York. The only means of doing this was to pay the tax in the year due and file claims for refund in the proper administrative channels. If denied, these refund claims would constitute the basis for suit in the courts. The taxpayer followed this procedure, eventually settled the case, and received substantial refunds. By this time, federal tax liability for 12 different years was also involved.

In the first case, concerning the years 1938, 1939, and 1941, the Commissioner disallowed the deduction by the taxpayer in 1938 and 1939 of the amounts of the property tax which were eventually refunded and also taxed the refunded property tax as income in the year of refund, 1941. The taxpayer sued for refund, claiming that the disputed property taxes were not deductible in the year paid and were not income in the year refunded. The Court of Claims held

[75] Southern Md. Agricultural Ass'n v. United States, 147 F. Supp. 276 (Ct. Cl. 1957).

[76] Consolidated Edison Co. v. United States, 135 F. Supp. 881 (Ct. Cl. 1955), *cert. denied*, 351 U.S. 909 (1956); Consolidated Edison Co. v. United States, 162 F. Supp. 854 (S.D.N.Y. 1958), *rev'd*, 229 F.2d 152 (2d Cir. 1960), *aff'd*, 366 U.S. 380 (1961).

against the taxpayer so that it was taxed in the year of refund (1941) on the disputed amounts refunded.[77]

In the year 1951 Consolidated Edison received real property tax refunds for the years 1943-50 pursuant to the settlement already discussed. It reported these amounts as income in the year 1951, as indicated by the Court of Claims decision, and filed claim for refund which was duly denied. On suit in the district court, the Government claimed that the taxpayer was collaterally estopped by the Court of Claims suit. The court ruled against the Government on this contention, but granted summary judgment for the Government after all the facts were stipulated on the basis of stare decisis.[78]

The Second Circuit reversed,[79] finding that the Court of Claims decision had been incorrect on the law. It agreed with the district court, however, that collateral estoppel did not apply on the basis of the *Sunnen* "separable even though similar" language,[80] holding that the application of the State revenue statute to a taxpayer's status was a separable issue in each taxable period. This decision was affirmed by the Supreme Court which did not reach the collateral estoppel issue, but granted certiorari to settle the conflict in doctrine between the Court of Claims and the Second Circuit.[81]

The application of collateral estoppel in this case would have been incorrect, but the language of the *Sunnen* case appears to have misled the Second Circuit into doing the right thing for the wrong reason. It has long been settled that collateral estoppel does not apply to pure issues of law. While ordinarily the distinction between issues of law and issues of fact may be difficult to trace with exactitude, it is particularly clear in this case. Here, all the issues of fact were stipulated between the parties in the district court, and the only thing remaining to be done was to decide how the law would operate on this combination of facts. The true basis for deciding the *Consolidated Edison* case should have been that there was no issue of fact, or of mixed law and fact, on which an estoppel could operate. While the issues probably were separable here by *Sunnen* standards, the parties really stipulated out the collateral estoppel issue when they stipulated all the facts.

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77 135 F. Supp. 881 (Ct. Cl. 1955).

78 162 F. Supp. 854 (S.D.N.Y. 1958).

79 279 F.2d 152 (2d Cir. 1960).

80 *Id.* at 154.

81 366 U.S. 380 (1961).

It may be that the court was somewhat off balance because it was delegating to itself the duty of eliminating an erroneous (in its opinion) doctrine being created by the Court of Claims. It is an interesting commentary on the restricted channels of appeal from Court of Claims decisions that the Supreme Court, after having denied certiorari in the Court of Claims case,[82] would then grant it in the Second Circuit case and determine that the Court of Claims was in error.

Whatever the reasoning of the *Consolidated Edison* case ought to have been, it seems clear that the reasoning given is in conflict with the *Southern Maryland* case. The application of collateral estoppel in *Consolidated Edison* was said by the Second Circuit to be governed by the exact factor — the "separability" of the different taxable periods in which it was necessary to define the application of the State revenue statute to the taxpayer's status — which was ignored in the *Southern Maryland* case. It is ironic that that important factor was in reality rendered irrelevant by the course of the *Consolidated Edison* litigation.

B. Change of Law

The above discussion indicates that the "separable even though similar" language of *Sunnen* has left the law in a far from satisfactory condition. The "change of law" reasoning of *Sunnen* has, however, fared much better in the intervening years. It appears to have been generally accepted, and the principal difficulty has been in defining the boundaries of what constitutes a change of law.

(1) Statutes and Regulations. —There has been no difficulty in defeating estoppel when the statute originally relied upon has been changed,[83] and there is at least dictum following *Sunnen* to the effect that a change in Treasury regulations affecting the case will defeat estoppel.[84]

(2) Case Law. —Defining what is required to constitute the necessary change in case law has occasionally presented problems. There is no problem avoiding estoppel when the case law upon

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[82] 351 U.S. 909 (1956).

[83] *See, e.g.*, National Bank, 12 T.C. 717, 723 (1949); Jacob's Fork Pocahontas Coal Co., 24 T.C. 60, 67 (1955) (dictum).

[84] Jacob's Fork Pocahontas Coal Co., 24 T.C. 60, 67 (1955).

which the first case is based is directly overruled or modified.[85] On the other hand, the courts are uncertain regarding the effect of consent and other types of State court decrees in *Blair* type situations where there is no real examination by the State court of the issues.[86]

Another more difficult situation arises when the principal case is not overruled or directly modified, but the case law touching on the point on which estoppel is sought is in a state of flux. Surprisingly, the courts appear to favor estoppel when the cases throwing doubt on the ruling case can be in any way distinguished.[87] It would seem that this view is incorrect, for if the other cases have thrown enough doubt on the principal case to require argument and analysis, much of the timesaving benefit of collateral estoppel is already lost, and it appears proper to give the litigants full hearing in light of all the latest developments.

In review, it appears that the *Sunnen* doctrines, whatever their wisdom, have at least survived through the years since their publication. The difficulties in definition of the change of law doctrine of *Sunnen* have really only existed in those fringe areas where every judicial doctrine has rather indefinite limits. The "separable even though similar" doctrine, although it has led to confusion, has not been seriously modified.

VI. THE AFTERMATH OF THE EVERGREENS

The doctrine of *The Evergreens*, however, has not fared as well, and it appears that its murky rule has been limited to its facts. In *United States v. Kramer*,[88] a criminal defendant had been ac-

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[85] *See, e.g.*, Mandel v. Commissioner, 229 F.2d 382 (7th Cir. 1956); Stanback v. Robertson, 183 F.2d 889 (4th Cir. 1950); Bush v. Commissioner, 175 F.2d 391 (2d Cir. 1949); Big Eagle v. United States, 300 F.2d 765 (Ct. Cl. 1962). As the *Mandel* and *Bush* cases indicate, this situation is particularly prevalent in cases dealing with divorce settlements. The typical pattern in these cases is that the Commissioner fails in his attempt to tax payments made pursuant to a settlement to one spouse and thereafter attempts to tax them to the other spouse. It is clear that if the Commissioner fails in his second attempt, the second decision is a sufficient change of law to avoid estoppel when he tries again against the first spouse.

[86] Those cases actually dealing with collateral estoppel seem to favor the rule that if the State decision was appealed, it is sufficient change of law under the *Blair* doctrine. Commissioner v. Thomas Flexible Coupling Co., 198 F.2d 350 (3d Cir. 1952); Kelly's Trust v. Commissioner, 168 F.2d 198 (2d Cir. 1948). The question of effect of State court decrees in federal tax proceedings is, however, so undecided that it seems unwise to state this as the rule. *See* Comment, *Effect of State Court Decrees in Federal Tax Litigation: A Proposal for Judicial Reform*, 30 U. CHI. L. REV. 569 (1963).

[87] *See* Lynch v. Commissioner, 216 F.2d 574 (7th Cir. 1954); Hercules Powder Co. v. United States, 337 F.2d 643 (Ct. Cl. 1964).

[88] 289 F.2d 909 (2d Cir. 1961).

quitted on a charge of aiding and abetting the robbery of a post office. The judge had instructed the jury that it was sufficient under this charge for conviction if the defendant had "participated" in the robbery. In a subsequent proceeding against the same defendant for conspiracy to rob the post office, the defendant asserted the defense of collateral estoppel, claiming that if he could not have participated, he could not have conspired. The Government claimed that participation would have been a mediate datum in the second litigation under *The Evergreens* doctrine, and that collateral estoppel could not apply.

On appeal, the Second Circuit held against the Government, stating that *The Evergreens* "must be read in context," and that "it may be doubted whether the court intended to establish this as a rigid rule even in civil cases."[89] It then proceeded to respect the "reason," not the language of that case, and found for the defendant.

Although considerable doubt may be cast upon the continued vitality of *The Evergreens*, the spirit which moved Judge Hand to attempt to formulate the limitations of that case is still very much alive. In order to avoid the pitfalls of the Hand analysis, the Court of Appeals for the Fifth Circuit, after mentioning *The Evergreens*, proceeded in the case of *Hyman v. Regenstein*[90] to formulate its own rule: "[C]ollateral estoppel by judgment is applicable only when it is evident from the pleadings and record that determination of the fact in question was necessary to the final judgment and it was foreseeable that the fact would be of importance in possible future litigation."[91] The court then proceeded to apply collateral estoppel to the facts of the case before it, which involved claims of fraudulent inducement to contract to assign patents, and which in one form or another had been litigated five times previously.

The *Hyman* case has been repeatedly cited in the Fifth Circuit and appears well entrenched there.[92] In addition, the *Kramer* case cites the *Hyman* case with evident approval,[93] which may indicate its acceptance in the Second Circuit. It is, of course, open to some question whether these developments are of equal significance in

[89] *Id.* at 916-17.

[90] 258 F.2d 502 (5th Cir. 1958), *cert. denied*, 359 U.S. 913 (1959).

[91] *Id.* at 511.

[92] *See* Tomlinson v. Lefkowitz, 334 F.2d 262, 264 (5th Cir. 1964), *cert. denied*, 379 U.S. 962 (1965); National Sur. Corp. v. Musgrove, 310 F.2d 256, 259 (5th Cir. 1962); Ballard v. First Nat'l Bank, 259 F.2d 681, 684 (5th Cir. 1958).

[93] 289 F.2d at 917.

the field of tax law which has tended to regard its collateral estoppel problems as rather special and may not be receptive to developments in other areas of the law. Nevertheless, the foreseeability doctrine of *Hyman* appears to have great merit in tax cases, for it should not be difficult to apply in the typical situation involving a series of causes of action based on the same transactions, and it eliminates much of the cloudy, hairsplitting language of *Sunnen*, *The Evergreens*, and their predecessors.

VII. An Analysis

It is clear from the above discussion that the *Sunnen* case has not by any means provided the final answer to collateral estoppel in tax cases. Contrary to the belief held by many that *Sunnen* has provided answers for the peculiar problems of tax cases, it appears that *Sunnen* really developed very little doctrine different from that of other branches of the law. The adoption of the *Hyman* doctrine would undoubtedly improve the situation, but it is a serious question whether *Hyman* or any other variant of collateral estoppel will constitute the best answer to the problems of tax law.

It cannot be denied that the perennial nature of tax litigation gives it a special status. It is not infrequent for 10 or 12 taxable years, the same taxpayer, and the same issues to be in contest at the same time. Frequently most of the years will be tried at the same time, but often later years are held for settlement in the Appellate Staff pending disposition of the earlier years by the courts. The taxpayer also has the option of splitting the various years between the Tax Court, the Court of Claims, and the district court, if he is willing to pay the disputed amount in some years. In these cases some way should be found to prevent a recalcitrant party from trying the same issues many times over, frequently in cases involving lengthy and complicated evidence. Sometimes in cases like these, courts employ collateral estoppel very broadly in pure self-defense. A case in point is *Broadhead v. Enochs*.[94]

In this case, the Bureau of Internal Revenue had made assessments for the years 1940-45 after the ordinary statute of limitations had run on the assertion that the taxpayer had filed fraudulent returns, and the Government had also assessed fraud penalties for the year 1946 on which the statute had not run. The year 1946 was tried first before the Tax Court, which found deficiencies but no

[94] 179 F. Supp. 876 (S.D. Miss. 1959).

fraud.[95] The taxpayer paid the assessment for 1940-45 and sued for refund for the year 1943. The district court[96] held that there was no fraud and that consequently the entire assessment had to be refunded, since it had been made after the statute had run. Notwithstanding the two decisions against it, the Government insisted on a trial for the years 1940-42 and 1944-45.

In the last trial[97] the district court resorted to very broad use of collateral estoppel, even to facts that were not "ultimate facts," but rather "mediate data" under *The Evergreens* analysis,[98] and to conclusions based on "separable even though similar" facts under the *Sunnen* definitions.[99] The court cannot be condemned for this use of the doctrine, for as it was, the trial lasted almost 3 weeks, and the judge had to review a voluminous record to make his findings. Allowing the estoppel to operate broadly at least saved the judge from having to take even more time to hear additional evidence on points that had already been extensively debated and from having to extend the trial at a time when there were many other cases crowding the docket.[100]

The blame for repeated litigation of the *Broadhead* variety probably lies with both parties. If the taxpayer had so desired, he could no doubt have brought all the years before the same court at the same time. As a part of trial strategy, however, he was probably hedging against an adverse first decision, and would have been just as stubborn about being bound by an adverse decision as the Government turned out to be.[101] On the other hand, the Government produced no significantly different evidence in the later trials, and there appears to be no excuse for not giving in gracefully. As is

[95] Sam Broadhead, 24 P-H TAX CT. MEM. 1079 (1955), *aff'd*, 254 F.2d 169 (5th Cir. 1958).

[96] Broadhead v. Enochs, 162 F. Supp. 897 (S.D. Miss. 1958).

[97] 179 F. Supp. 876 (S.D. Miss. 1958).

[98] *Id.* at 883.

[99] *Id.* at 880-81.

[100] For a discussion of this point, see the statement of Judge Mize, Broadhead v. Enochs, 162 F. Supp. 897, 898 (S.D. Miss. 1958).

[101] The same tactical considerations were probably involved in the *Hercules Powder*, *Consolidated Edision*, and *Southern Maryland* cases. In other instances where estoppel situations arise, it is because the taxpayer had particular reasons for wishing to bring suit in the district court or Court of Claims (*e.g.*, to get a jury trial, or to get the trial held in a place where his witnesses and evidence are located but where the Tax Court does not sit, or to avail himself of a possible erroneously favorable and virtually unappealable doctrine in the Court of Claims (*Query*: Was Consolidated Edison hoist with its own petard?)), and wished to pay the disputed amount for 1 year only. On these and similar considerations, see Carey, *Choosing Tax Procedures for Tactical Advantage*, 40 NOTRE DAME LAW. 363 (1965).

usual in these cases, stubbornness did not pay, and the Government merely succeeded in putting the opponent to a lot of litigation expense. It should be noted that this sort of abuse, as well as attempts to stretch application of collateral estoppel too far, is indulged in equally by both the taxpayers and the Government. It should not be assumed that changing the law either to broaden or to narrow the application of collateral estoppel would unfairly benefit either side.

The problem with the use of collateral estoppel as a solution to the *Broadhead* type of problem is that no variant of estoppel is adequate to deal with the *Sunnen* and *Hercules Powder* situations where the tax consequences of a situation are determined by a series of contracts or corporate resolutions the terms of which are almost, but not quite, the same. In these cases it is more appropriate for a court to scrutinize the facts of each year which cannot be settled at a lower level, for it may be possible for the terms of any one document to vary just enough to change the tax consequences of the situation. One solution to this problem might be to give the courts the power to require joinder of all years involving the same parties and similar issues for which administrative settlement procedure has been effectively exhausted. If it could be worked out, this solution would probably eliminate cases like *Broadhead* and *Consolidated Edison.* Compulsory joinder, however, raises large problems under current law because the district courts, the Tax Court, and the Court of Claims all have jurisdiction over the trial of tax cases, and also because the taxpayer must pay the disputed taxes first in district court and Court of Claims proceedings. It is not the purpose of this article to investigate the intricacies of solution to these problems, and compulsory joinder is merely suggested here as a direction that thought might take.

VIII. CONCLUSIONS

The above discussion leads to the following conclusions. First, the *Sunnen* doctrines were neither particularly original nor peculiar to tax law. Second, the language of *The Evergreens* and parts of *Sunnen* was ill conceived and has led to confusion, and as a result, *Sunnen* has not had the settling effect generally hoped for when it was handed down. Third, the answers to the problems of multiple litigation in tax law appear to be the following: (1) giving a well-deserved *coup de grace* to *The Evergreens* doctrine and replacing it

with a concept of foreseeability from the *Hyman* case; (2) eliminating the "separable even though similar" language of *Sunnen* so that the true bases for analysis can be more clearly seen and utilized; (3) continuing in force the intervening change of law rule of *Sunnen*; and (4) examining the possibilities for procedural reform such as compulsory joinder which would eliminate some of the causes of multiple litigation.